

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs August 12, 2003

**STATE OF TENNESSEE v. STANLEY E. CHATMAN**

**Appeal from the Criminal Court for Davidson County**  
**No. 2002-T-15     Frank G. Clement, Jr., Judge**

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**No. M2002-02418-CCA-R3-CD - Filed December 23, 2003**

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The defendant, Stanley E. Chatman, was convicted in a bench trial of driving under the influence, second offense, and sentenced to eleven months, twenty-nine days, with all but fifty days suspended. See Tenn. Code Ann. § 55-10-401(a). In this appeal as of right, the defendant contends that the trial court erred by failing to suppress the results of his breath alcohol analysis. The judgment of the trial court is affirmed.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed**

GARY R. WADE, P.J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

James Robin McKinney, Jr., Nashville, Tennessee, for the appellant, Stanley E. Chatman.

Paul G. Summers, Attorney General & Reporter; P. Robin Dixon, Jr., Assistant Attorney General; and James Sledge and Jennifer Tackett, for the appellee, State of Tennessee.

**OPINION**

Shortly after 11:00 p.m. on May 22, 2001, Metro Police Officer Shawn Taylor, who was assigned to the DUI enforcement unit, observed a vehicle stopped in the middle of the intersection of Gay Street and 11<sup>th</sup> Avenue in north Nashville. The headlights were off. As the officer approached from the rear, the car's lights were turned on and the driver turned left turn onto 11<sup>th</sup> Avenue, crossing into the oncoming lane of traffic before pulling off the roadway to the right. At trial, Officer Taylor testified that after he turned on his blue lights and stopped, he found the defendant, who was driving the vehicle, holding his crotch and saying that he needed to use the bathroom. The officer smelled alcohol on the defendant's breath and the defendant admitted that he had been drinking. After allowing the defendant to urinate on the side of the roadway, the officer administered the walk-and-turn and one-legged-stand field sobriety tests, both of which the defendant failed to perform satisfactorily.

After being placed under arrest, the defendant agreed to a breath alcohol test. Officer Taylor checked the defendant's mouth for foreign objects such as gum or tobacco, confirmed that the defendant did not wear false teeth or retainers, and then observed the defendant for twenty-one minutes, using a stopwatch, to make sure he did not burp or regurgitate. The test showed a blood alcohol concentration of .142%. Under the driver's seat of the defendant's vehicle, Officer Taylor found two twenty-four-ounce beers, one half-empty and the other unopened. The officer advised the defendant of his Miranda rights during the observation period, claiming that he did so from memory without having to look away from the defendant in order to read. Officer Taylor testified that he did not complete any paperwork during the observation period.

At trial, the defendant acknowledged that he had consumed two twenty-four-ounce beers between 6:30 or 7:00 p.m. and 10:00 or 10:30 p.m. He explained that he had been at a friend's residence and that on his way home, he had stopped at a convenience market to use the restroom, which was out of order. He admitted that he purchased an additional twenty-four-ounce beer while there. The defendant contended that he had slowed his vehicle in the intersection of Gay and 11<sup>th</sup> because there was "a lot of trash [dumped] in the middle of the street." He stated that he had taken blood pressure medications that had made him drowsy and that a metal rod in his leg would have affected his performance on the field sobriety tests.

At the conclusion of the evidence, the trial court found the defendant guilty of driving under the influence, second offense, and ordered a sentence of eleven months and twenty-nine days, with all but fifty days suspended. In this appeal of right, the defendant asserts that the trial court erred by admitting the results of the breath alcohol test because the machine was not properly certified and because the officer did not adequately observe him for the requisite twenty minutes prior thereto.

Prior to trial, the defendant filed a motion to suppress the results of the breath alcohol test on the grounds that the officer had failed to observe him for the twenty minutes required by State v. Sensing, 843 S.W.2d 412 (Tenn. 1992). At the suppression hearing, Officer Taylor testified that prior to administering the test, he "watched [the defendant] face to face for 22 minutes," timing the observation period with his stopwatch. Printouts from the breathalyzer machine indicated that he activated the machine, pressed the reset button at 11:32 p.m., and then administered the test at 11:54. Officer Taylor acknowledged that he "glanced" at his stopwatch once or twice during the observation period, but described the action as "like blinking." He testified that he did not work on any reports or make any radio calls during the twenty minutes. The trial court denied the motion without comment, stating later at trial that he found that Officer Taylor and the testing procedure had complied with Sensing.

In 1985, our statutory scheme was amended to establish a statewide procedure for administering breath tests in such a manner as to ensure reliability and accuracy:

(d) (2) Upon approval of the director of the Tennessee bureau of investigation, local governing bodies which have the responsibility for providing funding for sheriffs' offices and police departments, are authorized to purchase from

state contracts approved for bureau purchases, scientific instruments designed to examine a person's breath and measure the alcohol content thereof, for use as evidence in the trial of cases; provided, that prior to use thereof, such instruments must be delivered to the forensic services division of the bureau for testing and certification pursuant to subsection (g). The bureau shall continue to maintain and certify the instruments and operating personnel, pursuant to subsection (g), and furnish expert testimony in support of the use of such instruments when required.

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(g) The bureau, through its forensic services division, shall establish, authorize, approve and certify techniques, methods, procedures and instruments for the scientific examination and analysis of evidence, including blood, urine, breath or other bodily substances, and teach and certify qualifying personnel in the operation of such instruments to meet the requirements of the law for the admissibility of evidence. When examinations, tests and analyses have been performed in compliance with such standards and procedures, the results shall be prima facie admissible into evidence in any judicial or quasi-judicial proceeding subject to the rules of evidence as administered by the courts.

Tenn. Code Ann. § 38-6-103(d)(2), (g).

Later, in State v. Sensing, our supreme court held that for a breath test to be admissible, the testing officer must be able to testify as follows:

- (1) that the tests were performed in accordance with the standards and operating procedure promulgated by the forensic services division of the Tennessee Bureau of Investigation (TBI);
- (2) that the administering officer was properly certified in accordance with those standards;
- (3) that the evidentiary breath testing instrument used was certified by the forensic services division, was tested regularly for accuracy and was working properly when the breath test was performed;
- (4) that the motorist was observed for the requisite 20 minutes prior to the test, and during this period, he did not have foreign matter in his mouth, did not consume any alcoholic beverage, smoke, or regurgitate;
- (5) that the administering officer followed the prescribed operational procedure; and
- (6) that the administering officer can identify the printout record offered in evidence as the result of the test given to the person tested.

843 S.W.2d at 416. The six requirements in Sensing are mandatory and must be proven by a preponderance of the evidence. State v. Edison, 9 S.W.3d 75, 77 (Tenn. 1999). This court has ruled that the Sensing requirements must be “scrupulously followed.” State v. Harold E. Fields, No. 01C01-9412-CC-00438 (Tenn. Crim. App., at Nashville, Apr. 12, 1996). The prerequisites, once proven by a preponderance of the evidence, establish the propriety of the test results. Edison, 9

S.W.3d at 77. Further, it is the state's burden to establish compliance with each of the requirements; the defendant does not bear any burden to show non-compliance. The finding of the trial court is presumed to be correct and should only be overturned if the evidence preponderates otherwise. Id. at 78.

Initially, case law provides that an officer may not guess, estimate, or approximate the amount of time the subject was under observation. See State v. Hackney, No. 01C01-9704-CC-00152 (Tenn. Crim. App., at Nashville, Feb. 20, 1998); Fields, slip op. at 5. While an unblinking gaze is not required, "the officer must be watching the defendant rather than performing other tasks." State v. Korsakov, 34 S.W.3d 534, 540 (Tenn. Crim. App. 2000). The twenty-minute observation requirement carries with it two distinct elements: (1) The state must demonstrate that the defendant was observed for twenty minutes, and (2) the state must establish that the subject did not smoke, drink, eat, chew gum, vomit, regurgitate, belch or hiccup during the twenty minutes prior to taking the test.

The purpose of the observation requirement is, of course, to ensure "that no foreign matter is present in the defendant's mouth that could retain alcohol and potentially influence the results of the test." State v. Cook, 9 S.W.3d 98, 100-01 (Tenn. 1999). Our supreme court has found that "if credible proof establishes that the subject did not have foreign matter in the mouth, did not consume any alcoholic beverage, and did not smoke or regurgitate, then the rule is satisfied." State v. Hunter, 941 S.W.2d 56, 57-58 (Tenn. 1997).

Prior to the court's decision in Sensing, the testifying officer was required to be qualified through education, training, and experience to "interpret the test results in evidence" as a prerequisite to admissibility. Pruitt v. State, 216 Tenn. 686, 393 S.W.2d 747, 751 (Tenn. 1965). The state was required to "show that the measuring device [was] scientifically acceptable and accurate . . . and that the witness who presents the test results is qualified to interpret them." Id. In Pruitt, our supreme court stated that a lesser standard would be tantamount to approval of "pure hearsay evidence of intoxication." 393 S.W.2d at 752; see also State v. Johnson, 717 S.W.2d 298 (Tenn. Crim. App. 1986).

In our view, the record supports the trial court's finding that Officer Taylor properly observed the defendant for a full twenty minutes before administering the breath alcohol test. By denying the motion to suppress, the trial court implicitly accredited the testimony of the officer that he had watched the defendant, face to face, for over twenty minutes. The printouts from the breathalyzer machine corroborate the officer's testimony with regard to the length of the observation period. Officer Taylor stated that he did not complete any paperwork or make any radio calls during the twenty minutes and that he advised the defendant of his Miranda rights from memory. The defendant argues that because the officer glanced at his stopwatch, his attention was diverted elsewhere during the observation period. According to Officer Taylor, however, the action took no more time than "blinking." That the officer may have looked away from the defendant for a second to check his watch does not invalidate the entire observation period.

The defendant also argues that the results of the test should not have been admitted because the breathalyzer machine was not properly certified every ninety days in accordance with TBI standards. The record reflects that the machine was certified on March 28, 2001, and then again on June 28, 2001, some ninety-two days later. The defendant's arrest and submission to the breathalyzer test, however, was on May 22, just fifty-five days after the machine's last certification. Because the machine was used within the certification window and because the defendant has presented no evidence that the machine was malfunctioning, this issue is without merit.

Accordingly, the judgment of the trial court is affirmed.

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GARY R. WADE, PRESIDING JUDGE